IN THE

Supreme Court of the United States

October Term, 1977

No. 77-222

JOSEPH CHRISTOVAO, d/b/a MERCANTUM TRADING COMPANY,

Petitioner,

vs.

UNISUL-UNIAO DE COOP. TRANSF. DE TOMATE DO SUL DO TEJO, S.C.R.L.; COOPERATIVA TRANSFORMADORA DOS PRODUCTOS AGRICOLAS DO VALE DO SORRAIA, S.C.R.L.; COOPERATIVA AGRICOLA DO VALE DO SADO, S.C.R.L.; COOPERATIVA HORTO-FRUTICOLA DO ROXO, S.C.R.L.; COOPERATIVA AGRICOLA DO MIRA, S.C.R.L.,

Respondents,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANT OF WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opinions Below

As Petitioner failed to comply with this Court's Rule 40(a), Respondents here recite the opinions with the man-

dated correct citations. Also, Petitioner has failed to mention the denials of permission to appeal to the New York Court of Appeals by both the Appellate Division and the Court of Appeals.

The opinion of the Supreme Court of the State of New York, County of New York, Special Term is not reported, but is appended to Petitioner's Brief as Appendix A, pp. 1a-4a.* The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, appended to petitioner's brief, is reported in 55 A.D. 2d 561, 390 N.Y.S.2d 71 (Appendix A, pp. 5a-11a). The opinion of the New York Court of Appeals, appended to Petitioner's Brief, dismissing Petitioner's Appeal to that court is reported in 41 N.Y. 2d 338, 392 N.Y.S. 2d 609 (Appendix A, pp. 11a-13a). Permission so to appeal to the Court of Appeals was denied on April 12, 1977 by the Appellate Division. Permission to appeal was denied by the Court of Appeals on July 5, 1977. Neither order of denial has been reported as yet.

Jurisdiction

The questions involved herein are not open to review in this Court. *State of Missouri ex. rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1 (1950). As Mr. Justice Frankfurter said in that case, "Whether a state makes such a choice is, like its acceptance or rejection of the doctrine of *forum non conveniens,* a question of State law not open to review here." (340 U.S. at 4.) *See also Adkins* v. *Underwood,* 520 F.2d 890, 894 (7th Cir. 1975), *cert. denied,* 423 U.S. 1017 (1975).

* Figures in parentheses with the letter "a" refer to pages in the Appendix to the Petition.

In addition, the jurisdictional statement does not satisfy Rule 19(a) of the Rules of this Court. It does not set forth that a state court has decided a "federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." A full explanation of this rule is made in an article in the Record of the Association of the Bar entitled "Manning the Dikes" by Mr. Justice John M. Harlan, 13 The Record of The Association of The Bar of The City of New York 541, 550-553, delivered as the Eighteenth Benjamin N. Cardozo lecture.

Questions Presented

The first question presented by Petitioner, whether CPLR 327 is constitutional, is clear.

The second question presented by Petitioner is not clear. His brief states that the question is: "Is the rule [CPLR 327] as applied unconstitutional as repugnant to Section 1 of the Fourteenth Amendment." This is so broad as to be meaningless unless there is added something indicating in what respect its application was unconstitutional.

On an analysis of the petition, the question seems to be "Is Rule 327 unconstitutional in permitting transfer of the case from New York to Portugal, a communist country in which Petitioner cannot get a fair trial since he is a resident of New York?"

The Reasons the Writ Should Be Denied

1. Petitioner's petition raises no substantial constitutional question as required by Rule 19(a) of this Court's Rules.

2. The petition fails to demonstrate, as indeed it could not demonstrate, compliance with Rule 23(f) of this Court's rules. Rule 23(f) mandates that where a review of a state court's judgment is sought, petitioner must

> "... show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

As is clear from an examination of the record on appeal, the question was not raised in any way whatsoever in the Court of original instance. Notwithstanding Petitioner's contention that it was implicitly raised there, it was completely ignored and was raised for the first time in the Appellate Division of the Supreme Court of the State of New York. It was given short shrift both there and in the three subsequent attempts by Petitioner to obtain reversal of the original motion decided in Respondents' favor.

Statement

Petitioner's statement, insofar as it relates to the basic recitation of the progess of the case through his repeated unsuccessful appeals, is accurate. In all other respects it is replete with irrelevant misstatements unsupported by the record. Most importantly, the Petitioner attempts to reraise in this Court the factual issues raised in every court below which are not before this Court at the present time. His attempt to address Respondents' supposed waiver, the supposed inability to get a fair trial in Portgual and the rambling references to the underlying business relationship

of the parties, have all been disposed of by the courts below in the original finding that Portugal was the proper forum and that Petitioner's arguments against it were found wanting (Appendix A, pp. 1a-4a). The sole possible question before this Court would be the constitutionality of Rule 327 of the Civil Practice Law and Rules as improperly denying due process or equal protection of the law to an alien resident.

As found by the Trial Court, quasi in rem jurisdiction in this matter was obtained by an Order of Attachment, dated November 17, 1975, followed by the attachment of approximately $185,000 and personal service of the Summons and Complaint upon Respondents in Portugal (see Appendix A, p. 1a and Petitioner's Statement, page 5). Respondents are Portuguese agricultural cooperatives corporations principally engaged in raising and processing tomatoes (Appendix A, p. 1a), except for Respondent Unisul, a Portuguese corporation which is their marketing agent (Appendix A, p. 1a). Petitioner is a Portuguese citizen and a resident of New York. As the Trial Court found, it is undisputed that the agreement was executed in Portugal (Appendix A, p. 2a).

As set forth in Petitioner's statement (p. 5), Petitioner's complaint is a complicated one, as follows:

> "Petitioner's complaint alleges five causes of action as follows: First, the tortious and intentional destruction of petitioner's business; second, the breach of a joint venture agreement; third, an action for fraud; fourth, interference with third-party contractual relations, and fifth, the breach of a written agency agreement."

The alleged joint venture agreement is oral (Appendix A, p. 1a). It thus appears that this is an action be-

tween aliens for breach of an agreement made in Portugal and properly belongs in Portugal.

Petitioner is fluent in Portuguese (Appendix A, p. 3a). The officers and directors of Respondent corporations speak no English, except for Jose Potier, manager of Unisul, who speaks English only slightly (Appendix A, p. 3a). Trial of such a complicated case in New York requiring extensive use of interpreters would be a nightmare.

In any event, the constitutional question was not raised at Special Term of the Supreme Court in New York, the court of first instance, or discussed in its opinion. Petitioner claims it was implicitly raised by his claim that he would not receive a fair trial in Portugal. It was raised expressly for the first time in the Appellate Division on appeal from the order of the court of first instance. The claim of unconstitutionality was not discussed in the majority opinion of the Appellate Division; the Appellate Court merely affirmed for the reasons stated by the Court at Special Term (Appendix A, p. 5a).* The Trial Court, as is clear from the opinion of Mr. Justice Tierney (Appendix A, pp. 1a-4a), discussed the factors which influenced it in deciding that the case should be transferred to Portugal, stating in Appendix A, p. 3a:

> "As to that branch of the motion seeking forum non conveniens relief, it is the court's opinion that 'on balancing the interests and convenience of the parties and the courts (this) action could better be adjudicated in' Portugal, since

* It may be here noted that the New York Court of Appeals, in its opinion (Appendix App. 11a-13a) dismissing Petitioner's appeal to that Court as a matter of right, stated in page 13a of Appendix A that the constitutional question articulated by Appellant is not substantial. There is no constitutional impediment to the application of forum non conveniens to a New York resident.

> 'it plainly appears that New York is an inconvenient forum and that another is available which will best serve the end of justice and the convenience of the parties' (Silver v. Great American Ins. Co., 29 N Y 2d 326 [sic] 360, 361). Although the New York residency of a party is an important factor, and plaintiff has resided here for over 15 years, he is still a Portugese national and makes frequent business trips to his native land. He has a fluent command of the Portuguese language and has not claimed that the prosecution of his action requires testimony of non-Portuguese speaking residents of the United States other than his wife, whereas defendants are clearly not proficient in English. Further, the transaction giving rise to the contractual aspect of this litigation arose in Portugal and plaintiff's affidavits furnish little factual support for the conclusory language of the complaint ascribing tortious conduct here by defendants."

Even the "dissenting"* justices of the Appellate Division agreed with this part of his opinion (Appendix A, p. 10a):

> "With respect to the application of *forum non conveniens* I am in accord with the analysis of Special Term wherein it was observed that 'it is the court's opinion that 'on balancing the interests and convenience of the parties and the courts [this] action could better be adjudicated in' Portugal, since 'it plainly appears that New York is an

* The dissent was not a true one and was found by the Court of Appeals to be, in actuality, a concurrence (Appendix A, p. 13a).

inconvenient forum and that another is available which will best serve the end of justice and the convenience of the parties' (Silver v. Great American Ins. Co., 29 NY2d 356, 361). Although the New York residency of a party is an important factor, and plaintiff has resided here for over 15 years, he is still a Portuguese national and makes frequent trips to his native land. He has a fluent command of the Portuguese language and has not claimed that the prosecution of his action requires testimony of non-Portuguese speaking residents of the United States other than his wife, whereas defendants are clearly not proficient in English. Further, the transaction giving rise to the contractual aspect of this litigation arose in Portugal and plaintiff's affidavits furnish little factual support for the conclusory language of the complaint ascribing tortious conduct here by defendants. Lastly, plaintiff has failed to persuade the court that he will not receive a fair trial in Portugal.' On this basis I conclude that it was proper to refuse to entertain the plaintiff's action."

Despite the finding of the Court of first instance that Petitioner can obtain a fair trial in Portugal, which finding was unanimously affirmed by the Appellate Division with both the Appellate Division and the Court of Appeals declining Petitioner's applications for leave to appeal, Petitioner's statement is devoted to a lengthy discussion of the question of fact, *i.e.* whether Petitioner could obtain a fair trial in Portgual.

Findings of fact so found cannot be reviewed by this Court. *Graver Tank & Mfg. Co., et al.* v. *Linde Air Products Co.*, 366 U.S. 271 (1949).

As Mr. Justice Jackson, speaking for a unanimous Court, said (366 U.S. at 275):

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. Goodyear Tire & Rubber Co. v. Ray-O-Vac. Co. 321 U.S. 275, 64 S. Ct. 593, 88 L. Ed. 721; District of Columbia v. Pace, 320 U.S. 698, 64 S. Ct. 406, 88 L. Ed. 408; Williams Mfg. Co. v. United Shoe Machinery Corp., 316 U.S. 364, 62 S. Ct. 1179, 86 L. Ed. 1537; Baker v. Schofield, 243 U.S. 114, 118, 37 S. Ct. 333, 334, 61 L. Ed. 626."

Petitioner, in his brief in Question No. 1 (page 17), discusses Rule 327 as if it were a novel legislative innovation in the law, but, as pointed out by Paxton Blair, Esq. (later Justice Blair of the New York Supreme Court) in his classic article on the subject * (Appendix A, p. 6a), the doctrine has been applied in cases dating back a century although under a different name.

Furthermore, Rule 327 was a specific legislative response to the decision of the New York Court of Appeals in *Silver* v. *Greeat American Insurance Company*, 29 N.Y. 2d 356, 278 N.E. 2d 623, 328 N.Y.S. 2d 398 (1972) (incorrectly cited by Petitioner as 29 N.Y. 2d 326 on page 3a of his appendix). In *Silver*, the Court discussed the history of the doctrine and its present form in New York; Rule 327 was the codification of that case law. For an excellent discussion of *Silver* and CPLR 327 see Schropp, *Forum Non Conveniens —Closing the Gap*, 58 Cornell L. Rev. 782 (1972).

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* Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. (1929).

The constitutionality of the doctrine is extensively discussed by Mr. Blair in his article. Moreover, this Court rejected attacks on the constitutionality of forum non conveniens. *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501 (1947); *Koster* v. *Lumbermens Mut. Casualty Co.,* 330 U.S. 518 (1947); *State of Missouri ex rel. Southern Ry. Co.* v. *Mayfield,* 340 U.S. 1 (1950). *See also Douglas* v. *New York, N. H. & H. R.,* 279 U.S. 377 (1929).

Petitioner contends (page 17) that the last sentence of Rule 327 is unconstitutional and that the doctrine should apply only to residents, and not to Petitioner, a resident alien. Thus, Petitioner is not seeking the equal protection of law, but as a New York resident, claims to be in a privileged class.

In fact, the question of the remittal of a New York plaintiff to a jurisdiction outside the bounds of the United States on grounds of forum non conveniens has been faced by the New York Courts. *Irrigation & Industrial Development Corporation* v. *Indag,* 37 N.Y. 2d 522, 337 N.E.2d 749, 375 N.Y.S. 2d 296 (1975); *Mollendo Equip. Co.* v. *Sekisan Trading Co.,* 7 A.D. 2d 750, 392 N.Y.S. 2d 427 (1st Dept. 1977). In these recent expressions by the Courts of the State of New York, compelling reasons were found, as here, to justify dismissal on grounds of forum non conveniens. In both cases, resident plaintiffs were relegated to prosecution of their suits in courts in, respectively, Switzerland and Japan.

The cases cited by Petitioner in his brief, Page 23, to the effect that forum non conveniens is unconstitutional in relegating Petitioner to the courts of a foreign nation, are actually authority in favor of Respondents' position. As stated by Judge Dawkins in *Burt* v. *Isthmus Development Company,* 218 F.2d 353, 356 (5th Cir. 1955), *cert. denied,* 349 U.S. 922 (1955):

> "That such expressions are unsoundly broad and general is clear, for it has also been held that there exists in the federal courts an inherent power to decline jurisdiction in the interest of justice; and the doctrine of *forum non conveniens* is now well established in federal practice. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055; Koster v. (American) Lumbermens Mutual Casualty Co., 330 U.S. 518, 67 S. Ct. 828, 91 L. Ed. 1067."

Moreover, *Burt* involved a controversy between citizens of the United States, not a controversy between aliens with respect to a claimed case arising in the country in which both Petitioner and Respondents are citizens.

It ill-behooves Petitioner, a resident of the United States for 22 years but not a citizen, to complain of being relegated to the courts of his native land where he lived for over 20 years and from whose agricultural products he derived 90% of his income (Petitioner's Brief, p. 8).

As in *Burt,* the dismissal here is not because Petitioner is not a United States citizen and merely a resident, but because he should not have additional rights because of this fact.

Likewise, *The Founding Church of Scientology of Washington, D.C.* v. *Verlag, et al.,* 536 F. 2d 429, 435-436 (D.C. Cir. 1976), a case brought in the District of Columbia involving a resident plaintiff, a New York defendant and a controversy regarding a German publication. Jurisdiction was retained by the District of Columbia Court after it weighed various factors, including the fact that both parties were residents of the United States, witnesses were to come

from the United States and abroad and certain questions of law and evidence turned on local law. These questions here have already been decided by the Courts below, adversely to Petitioner.

Plaintiff cites three cases in support of his contention that Rule CPLR 327 is unconstitutional under the due process clause of the Fourteenth Amendment (Petitioner's Brief, page 18). None of these cases ever mentions forum non conveniens nor has any of them any relevance to the proposition for which they are cited by Petitioner. *Boddie* v. *Connecticut,* 401 U.S. 371 (1971), held that the petitioners, indigent women, had a right to file a divorce action in the state courts without paying the required $60.00 filing fee since that fee made access to the divorce courts an impossibility for them. The Court expressly limited that case to matrimonial matters, stating:

> "In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship." 401 U.S. 371 at 383-384.

Griffin v. *Illinois,* 351 U.S. 72 (1956) held that the requirement that indigent convicted felons pay for trial transcripts to enable them to appeal for reversible error was unconstitutional under the due process clause. The Court relied on factors not present in this case; *Griffin* has no relationship to the questions presented here and does not support Petitioner's position at all. *Armstrong* v. *Manzo,* 380 U.S. 545 (1963) was an action brought by a natural father to have an adoption proceeding where he had been adjudicated as delinquent in the support of his daughter and which allowed the adoption of the child by its natural mother's new husband void for lack of notice. Neither the opinion nor the language supports in any way the Petitioner's contention.

These cases deal with *total* denial of access, not a disposition once access has been granted, which simply remits a litigant to another forum.

In his discussion of the reasons for granting the petition, Petitioner contends that the application of CPLR 327 to Petitioner, a New York resident, renders the statute unconstitutional. The opinion of the Court of Appeals in *Silver* v. *Great American Insurance Company, supra,* unanimously held that the doctrine of forum non conveniens should be extended to include residents of the State of New York. The Court held (29 N.Y.2d at 361-362, 328 N.Y.S. 2d at 402-403):

> "Further thought persuades us that our current rule—which prohibits the doctrine of *forum non conveniens* from being invoked if one of the parties is a New York resident—should be relaxed. Its application should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties. Although such residence is, of course, an important factor to be considered, forum *non conveniens* relief should be granted when it plainly appears that New York is an inconvenient

forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine—its flexibility based on the facts and circumstances of a particular case—is severely, if not completely, undercut, when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation.

It has become increasingly apparent that a greater flexibility in applying the doctrine is not only wise but, perhaps, necessary. (See, e.g., Rosenberg, One Procedural Genie Too Many or Putting *Seider* Back Into Its Bottle, 71 Col. L. Rev. 660, 672; 1 Weinstein-Korn-Miller, N.Y. Civ. Prac., ¶301.07; Smit, Report on Uniform Interstate and International Procedure Act, Thirteenth Annual Report of N.Y. Judicial Conference, 1968, p. 138.) The fact that litigants may more easily gain access to our courts—with the consequent increase in litigation—stemming from enactment of the long-arm statute (CPLR 302), changing choice of law rules see, e.g., Babcock v. Jackson, 12 N.Y. 2d 473, 240 N.Y.S. 2d 743, 191 N.E. 2d 279 and decisions such as Seider v. Roth, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312, requires a greater degree of forbearance in accepting suits which have but minimal contact with New York. (See 1 Weinstein-Korn-Miller, N.Y. Civ. Prac. ¶ 301.07.) With that in mind, it was suggested in Simpson v. Loehmann, 21 N.Y. 2d 305, 312, 287 N.Y.S. 2d 633, 638, 234 N.E. 2d 669, 672; mot. for reargu. den. 21 N.Y. 2d 990, 290 N.Y.S. 2d 914, 238 N.E. 2d 319 that further study be given to the subject of *forum non conveniens*. And, a short time later, the State's Judicial Conference recommended a bill reciting, in part, that '[t]he domicile or residence in this state of

any party to the action shall not preclude the court from staying or dismissing the action.' " (Footnotes omitted.)

Petitioner had no less access to the Court than any other litigant; his plea was disposed of with all the due process, and with all of the equal protection afforded any other litigant.

Conclusion

Petitioner's application is in the main based on his contention that Portugal is a Communist-dominated country, in which he cannot obtain a fair trial, which is a question of fact decided adversely to Petitioner by the New York courts. It would be untenable for this Court to find the facts differently as a basis for its decision when the fact that Portugal is not a Communist-dominated country is so well known as to be a matter of judicial notice.

Of course, in any event, Rule 327 of the Civil Practice Law and Rules of the State of New York is not violative of Section 1 of the Fourteenth Amendment to the United States Constitution, and is not repugnant thereto in any respect, whether as applied in this action or otherwise, and, moreover, in any event Petitioner has failed to meet the burden of this Court's Rules 19(a) and 23(f).

Petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

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